83-1279

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STATE OF FLORIDA,

Petitioner,

vs.

JOHN SCOTT MEYERS a/k/a
JOHN SCOTT WEYERS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT.

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QUESTION PRESENTED

WHETHER THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA CORRECTLY CONSTRUED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT AFTER POLICE OFFICERS HAVE VALIDLY SEARCHED AND IMPOUNDED AN AUTOMOBILE, A SECOND SEARCH OF THAT SAME AUTOMOBILE, BASED ON PROBABLE CAUSE, EIGHT HOURS LATER WHILE THE AUTOMOBILE IS STILL IMPOUNDED REQUIRES A WARRANT?

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STATUTES

28 U.S.C. § 1257(3) 2

OPINION BELOW

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was filed on April 20, 1983; that court denied rehearing on June 15, 1983. Meyers v. State, 432 So.2d 97 (Fla. 4th DCA 1983).

GROUND UPON WHICH JURISDICTION IS INVOKED

The opinion of the District Court of Appeal of the State of Florida, Fourth District, was filed on April 20, 1983, reversing respondent's conviction and sentence (dated April 22, 1982 and June 3, 1982, respectively), and remanded the case for a new trial (A 1-7). That court denied a timely motion for rehearing on June 15, 1983 (A-8). In an unreported order, the Supreme Court of Florida denied the state's petition for discretionary review on November 29, 1983 (A 9-10). Thus, the opinion of the Fourth District Court of Appeal is the decision of the highest court in which decision could be had in this case. See Williams v. Florida, 399 U.S. 78, 80 n.5

(1970).

This petition is timely filed within 60 days of the denial of review by the Florida Supreme Court, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). [An order tolling and extending the state speedy trial period pending the disposition of the instant petition has been entered by the trial court.]

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

As the opinion of the Fourth District Court of Appeal (A 1-7) recites, de-

fendant[1/] was charged with sexual battery of a woman in the woman's bathroom of a motel at around 4:30 a.m.. Defendant and the victim were the only persons present, and their stories conflicted. The victim testified that defendant had forcibly tied her to a sink with a cord or piece of cloth before sexually battering her. Defendant testified that he did not tie the victim, but that he had engaged in consensual sex with her and that she objected only when he attempted a different method of sexual intercourse.

Defendant was arrested an hour or so later, and incident to his arrest the police searched his automobile and seized items of evidence related to the sexual battery. The vehicle was then towed to Sunny's Wrecker impoundment where it was locked in a secure area. Neither the first search nor the impoundment were challenged on appeal. Eight hours after defendant's arrest, another officer returned to the car to

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1/ Throughout this petition, petitioner will be called "the state," and respondent will be called "defendant."

search for the cloth strip with which the victim said she had been tied. No warrant was obtained, and the cloth strip was seized and used as evidence at trial.

On appeal by defendant, the fourth district held that defendant's pretrial motion to suppress the cloth strip should have been granted. It rejected the officer's contention at trial that his second search of defendant's vehicle was incident to defendant's arrest. The court also rejected the state's argument on appeal (A 11-13) that the second search constituted no greater intrusion on defendant's Fourth Amendment rights than did the first search, and that although it was warrantless it was nonetheless validly executed based upon probable cause. The district court reviewed the various exceptions to the warrant requirement and found none of them to apply. It held that the case must be reversed and remanded for a new trial based on this holding. At the conclusion of the opinion, since the

case was to be remanded for a new trial on the basis already discussed, the court decided to "briefly mention another appellate point," observing that the trial judge had unduly limited defendant's cross examination of the victim and that he should not be so limited on retrial.

Thereafter, the state timely filed a motion for rehearing and/or certification question (A 14-31), which was denied (A 8). A timely petition for discretionary review was denied by the Florida Supreme Court (A 9-10). This proceeding follows.

REASONS FOR GRANTING THE WRIT

The central issue in this case can be simply stated: Does a second, warrantless search of an automobile for evidence based on probable cause seem unreasonable where the police just hours before had already searched, obtained evidence from and impounded the same vehicle? Relying entirely upon cases decided by this Court, the Fourth District Court of Appeal has said yes. The state respect-

fully maintains that those same cases indicate that the answer should be no. To the state's knowledge, this question has never been specifically passed upon by this Court, and the state contends that it is worthy of this Court's review at this time.

The fourth district held that the contested search in this case did not fall within any of the recognized exceptions to the warrant requirement. However, it must be remembered that

> the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only "unreasonable searches and seizures." The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.

Coolidge v. New Hampshire, 403 U.S. 443, 509-510 (1971) (Black, J., concurring and dissenting). Furthermore, a well-recognized exception to the warrant requirement applies to searches of vehicles that are supported by probable cause. As this Court recently stated in United States v.

Ross, 456 U.S. 798, 809 (1982), "[i]n this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." (Footnote omitted.)

The automobile exception to the warrant requirement is grounded not only on the mobile nature of automobiles, but also on the recognition that a person's reasonable expectation of privacy in an automobile is less than that which pertains to a private dwelling or other building, and therefore is more open to legitimate governmental intrusion. See United States v. Chadwick, 433 U.S. 1, 11-13 (1977). In the instant case, defendant's arrest followed very shortly after the incident giving rise to it. His automobile was immediately searched, evidence was obtained therefrom, and it was impounded. Especially in view of the lesser expectation of privacy which pertains to automobiles initially, what further expectation of privacy remained to defendant after the first search? Since the

automobile had been impounded, how could defendant's expectation of privacy return after his privacy interests had already been invaded by a valid intrusion, and there had been no intervening possession by defendant before the second search?

This situation differs entirely from that which obtains in the search of a home or office, where living and its attendant privacy expectation goes on after the police leave. This Court recently met a similar issue in Illinois v. Andreas, ___ U.S. ___, 77 L.Ed.2d 1003 (1983), dealing with a second search of a closed container. This Court held that the warrantless reopening of a sealed container which had been discovered in an earlier lawful border search did not intrude on any legitimate expectation of privacy. No protected privacy interests remained in the container after the government officers had lawfully opened it, and the "simple act of resealing the container...[did] not operate to revive

or restore the lawfully invaded privacy rights." 77 L.Ed.2d at 1010. Since the inspection by police did not intrude upon a legitimate expectation of privacy, there was no search subject to the Warrant Clause. Id. The state maintains that the same reasoning should apply here.

Even if an expectation of privacy survivedthe first search and impoundment, the state maintains that the automobile exception to the warrant requirement applies. The fourth district held that it did not, because "in this case the element of mobility was removed because the appellant's vehicle had been impounded." That holding has been laid to rest by this court's decision in Michigan v. Thomas, ___ U.S. ___, 73 L.Ed.2d 750, 753 (1982), where this court stated:

> In Chambers v. Maroney, 399 US 42, 26 L Ed 2d 419, 90 S Ct 1975 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped

> on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in Texas v. White, 423 US 67, 46 L Ed 2d 209, 96 S Ct 304 (1975). See also United States v. Ross, ___ US ___, ___, n 9, 72 L Ed 2d 572 (1982). It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away or that its contents would have been tampered with, during the period required for the police to obtain a warrant.

(Emphasis supplied) (footnote omitted).

The fourth district misconstrued this Court's decisions by failing to focus on the validity of the initial intrusion. In Coolidge v. New Hampshire, supra, Justice Stewart harmonized the result in that case with the case of Chambers v. Maroney, 399 U.S. 42 (1970). As he explained, "[t]he rationale of Chambers is

that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of whether the initial intrusion is justified." 403 U.S. at 463 n.20 (emphasis in original).

Clearly then, in cases such as this the analysis must focus on the initial intrusion, and if the initial intrusion is justified, a second, warrantless intrusion based on probable cause is justified as well. In Coolidge the initial intrusion was not justified; in the instant case its validity was not even contested in the state appellate court. Again, the same rationale would not apply to a house because of the greater privacy interests at stake.

The state seeks this Court's review in this case not simply because it believes that the fourth district's opinion was wrong. Rather, the state believes that the issue presented here is an important one, and at least as worthy of

this Court's review as was the second search issue in Illinois v. Andreas, supra. Surely vehicle impoundments occur with at least the same, if not more, frequency as do the type of "controlled deliveries" which framed the issue in Andreas. As it presently stands, the fourth district's opinion in this case is binding on all trial courts in Florida until such time as they are told otherwise by their own district courts of appeal or by the Florida Supreme Court. See Dillon v. Chapman, 404 So.2d 354, 359 (Fla. 5th DCA 1981); State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1979). The continued application of the rule established in this case by Florida courts and others will result in the suppression of evidence in situations where no reasonable expectation of privacy exists, or if it does exist, where a well-established exception to the warrant requirement applies.

Finally, the state anticipates the argument that the final paragraph of the fourth district's opinion provides an

independent and adequate state ground for the decision, thereby precluding review by this Court. However, while the cross examination issue addressed in that last paragraph is certainly independent of the Fourth Amendment issue, the fourth district did not say that it would have reversed the case on that point alone. Rather, the court chose to "briefly mention" that point only because "the case must be remanded for a new trial" due to the reversal on the suppression issue. The state submits that the last paragraph was obviously meant to guide court and counsel on retrial, but was not the basis for the retrial, so that it is not an adequate state ground precluding review here.

Moreover, the basis for the independent and adequate state ground principle is that this Court is not permitted to render advisory opinions, and if the same judgment would be rendered by the state court after this Court corrected its disposition of a federal issue, this Court's review would amount to

nothing more than an advisory opinion. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977). Even assuming, arguendo, that the fourth district would reverse this case based on the cross-examination issue alone, a determination of the Fourth Amendment issue by this Court contrary to that of the fourth district would not be an advisory opinion. Since it must be retried, this case is not over. If the fourth district is wrong on the Fourth Amendment issue, and this Court does not correct it, then the state will be forced to go to trial on a charge involving a violent felony to the person erroneously denied of an important piece of evidence. Thus, if this Court is otherwise disposed to hear this case, it should not decline review based on an argument that there is an independent and adequate state ground for the decision.

CONCLUSION

It must be remembered that the Fourth Amendment is intended to protect rights of privacy. The state has maintained all

along that whatever privacy rights defendant had in his automobile were already validly invaded during the first search, and that the second search was no greater intrusion, especially since the car had been impounded. The Fourth Amendment analysis in this case should have focused on the first, not the second, search. The state respectfully submits that this case involves a substantial federal question which should be resolved by this Court, and respectfully requests that this Court grant its petition for writ of certiorari to the District Court of Appeal of the State of Florida, Fourth District.

Respectfully submitted,

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APPENDIX

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IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOHN SCOTT MEYERS a/k/a JOHN SCOTT WEYERS, Appellant, v. STATE OF FLORIDA, Appellee.	)NOT FINAL UNTIL)TIME EXPIRES TO)FILE REHEARING)PETITION AND,)IF FILED,)DISPOSED OF.))CASE NO.)82-1277.

Opinion filed April 20, 1983

Appeal from the Circuit Court for Broward County; Arthur J. Franza, Judge.

Richard L. Jorandby, Public Defender, Craig S. Barnard, Assistant Public Defender, and Thomas F. Ball, III, (Member of the South Carolina Bar), West Palm Beach, for appellant.

Jim Smith, Attorney General Tallahassee, Russell S. Bohn Assistant Attorney General West Palm Beach, for appellee.

WALDEN, J.

Meyers was convicted of sexual battery. He appeals. We reverse and remand for a new trial.

The reversal hinges primarily

upon an illegal search of Meyers' vehicle and seizure therefrom of a strip of cloth six feet in length and two and one half inches wide, which strip was received in evidence over Meyers' objection and despite his motion to suppress. This strip corroborated the victim's version of events.

The critical happenings occurred somewhere around 4:30 a.m. in a motel bathroom with only Meyers and the victim present. Their accounts were at complete variance. The victim testified that, against her will, Meyers forcibly tied her hands behind her back and then tied her to a sink with a cord or piece of cloth whereupon he sexually battered her. Meyers testified that he did not tie the victim. He said that they had consensual sex and that the victim only objected when a different method was attempted whereupon he departed.

Meyers was arrested and his vehicle was searched by Officer Latonia as an incident thereto and for inventory purposes, and items were seized. There

is no suggestion of a problem with this procedure. Thereafter the vehicle was towed to Sunny's Wrecker impoundment and there stored. It was locked in a secure area.

Approximately eight hours after Meyers' arrest, without any exigent circumstances, Chief Fitzgerald went to the compound and searched Meyers' vehicle without a warrant, this being the second search. He then seized the cloth strip in question. This was solely justified by the officer as being incidental to Meyers' arrest, a position with which we disagree.

The State contends that the second search of the appellant's vehicle presented no greater intrusion on the appellant's Fourth Amendment rights than did the search incident to the appellant's arrest.

The State's argument ignores the fact that the second search some eight hours after the initial search does not fall into one of the exceptions to the warrant requirement. First, contrary to the State's assertion, this case does

not fall into the moving vehicle exception to the warrant requirement found in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 453 (1925) and Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 387 (1970). In Chambers the Supreme Court was careful to note that the search of an automobile without securing a warrant was not proper in every circumstance. Rather, the court acknowledged that the exception was based on the fact that "the opportunity to search is fleeting since a car is readily movable." (Id. at 51) However, in this case the element of mobility was removed because the appellant's vehicle had been impounded.

Secondly, at the time of the second search the appellant had long been within police custody. Therefore, the search did not fall within the holding in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) regarding searches incident to a lawful arrest. This search was not made "contemporaneously" with the appellant's arrest. See State v. Licourt, 417 So.2d

1051 (Fla. 4th DCA 1982); Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964).

Finally, the subsequent search cannot be justified on the grounds of an inventory search. The vehicle had previously been searched and Chief Fitzgerald did not make any pretext of an inventory search. South Dakota v. Opperman, 428 U.S. 364 at 369, 96 S.Ct. 3092 at 3097, 49 L.Ed.2d 1000 (1976) and Miller v. State, 403 So.2d 1307 (Fla. 1981).

Thus, the second search of the appellant's vehicle at "Sunny's compound" did not fall into any recognized exceptions to the warrant requirement and the cloth strip seized from the appellant's vehicle was improperly obtained due to the fact that a warrant was not secured prior to Chief Fitzgerald's search. Therefore, under the facts and circumstances of this case the search conducted was unreasonable and violative of the appellant's rights under the Fourth Amendment. Appellant's motion to suppress should have

been granted.

In its brief seeking to uphold the validity of the second search the State cites only two cases, United States v. Ross, ___ U.S. ___, S.Ct. 2157, 72 L.Ed.2d 572 (1982) and Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 387 (1970). Neither of them, in our opinion, have any bearing on the instant issue.

United States v. Ross had to do with the scope of a search of a vehicle (closed containers in the trunk) which had been properly stopped based on probable cause.

Chambers v. Maroney critically held:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.
> (emphasis supplied)

Id. at 52.

The Chambers case supports the conclusion that we reach and does not support appellee's position.

Since the case must be remanded for a new trial we briefly mention another appellate point. In our opinion the trial court unduly limited the appellant's cross examination of the complaining witness to a period of approximately two hours preceding the alleged battery. While it is difficult to measure what constitutes an abuse of discretion, we feel, under the circumstances of this case, that appellant's counsel should have been permitted to plumb and explore the victim's activities for at least six hours prior to the time of the alleged crime.

We reverse and remand for a new trial consistent with the views herein expressed.

REVERSED AND REMANDED.

HERSEY and HURLEY, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOHN SCOTT MEYERS a/k/a JOHN SCOTT WEYERS, Appellant,	
v.	CASE NO. 82-1277
STATE OF FLORIDA, Appellee.	

June 15, 1983

BY ORDER OF THE COURT:

ORDERED that Appellee's May 5, 1983 Motion for Rehearing and/or Certification of Question is denied.

ORDERED that Appellee's May 5, 1983 Request for Oral Argument on the above motion is denied.

I hereby certify the foregoing is a true copy of the original court order.

CLYDE L. HEATH, CLERK

cc: Russell S. Bohn, Assistant Attorney General

Craig S. Barnard, Chief Assistant Public Defender

cms

SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 29, 1983

STATE OF FLORIDA, Petitioner,	
vs.	CASE NO. 63,973
JOHN SCOTT MEYERS, Respondent.	District Court of Appeal, 4th District - No. 82-1277

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R. App. P. 9.330(d).

ADKINS, ACTING C.J., BOYD, OVERTON, McDONALD and EHRLICH, JJ., Concur

C

A True Copy

TEST:

Sid J. White
Clerk,
Supreme
Court.

By:
Deputy
Clerk

cc: Hon.Clyde L. Heath, Clerk
Hon.Robert E. Lockwood, Clerk
Hon. Arthur J. Franza, Judge

Russell S. Bohn, Esquire
Craig S. Barnard, Esquire

POINT II

THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE OBTAINED DURING THE SECOND SEARCH OF THE AUTOMOBILE.

Appellant argues that the trial judge erred in denying the motion to suppress evidence which was obtained during a second search of his automobile conducted several hours after the first search and after it was impounded. During the initial part of his argument on the motion to suppress in the trial court, defense counsel argued that the automobile could not be constitutionally searched without a warrant eight hours after it had already been searched and impounded (R 50). The trial judge somewhat quizzically asked if defense counsel meant, as an analogous example, that once the police have searched the scene of a crime based on probable cause they could not check it out again after receiving further information (R 53). Defense counsel then shifted ground a bit, arguing that in this case the police could

not search the entire automobile without a warrant, although at the time of the arrest itself the front seat could be searched without a warrant (R 53).

Appellee maintains that the motion to suppress was properly denied upon the basis argued by the assistant state attorney, that is, it was a search based on probable cause (R 51-52). It is clear from the case of United States v. Ross, ___ U.S. ___, 72 L.Ed.2d 572 (1982) that if a search of a properly stopped vehicle was based upon probable cause, the permissible scope of the search is no narrower than that which a magistrate could legitimately authorize by warrant and can include every part of the vehicle and its contents which might conceal the object of the search. Furthermore, in Chambers v. Maroney, 399 U.S. 42, 52 (1970), in addressing the moving vehicle exception to the warrant requirement, the United States Supreme Court stated:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before present-

> ing the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

By similar reasoning, Appellee maintains that the second search of the automobile in the instant case constituted no great intrusion on Appellant's Fourth Amendment rights than did the first search, which did not intrude on those rights. Therefore, the suppression motion was properly denied.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JOHN SCOTT MEYERS a/k/a JOHN SCOTT WEYERS, Appellant,	)
v.	) CASE NO.
STATE OF FLORIDA, Appellee.	) 82-1277

MOTION FOR REHEARING AND/OR CERTIFICATION OF QUESTION.

Appellee, the State of Florida, by its undersigned counsel, hereby requests that this court grant a rehearing of its opinion in the above-styled case and/or certify the question involved here as one of great public importance, on the following grounds:

1. In its opinion filed on April 20, 1983, this court reversed and remanded the case for a new trial based on the holding that the search of appellant's vehicle after it was impounded was illegal and that the cloth strip found during that search should not have been admitted in evidence. In so ruling,

appellee respectfully maintains that this court has overlooked controlling principles of law announced in the cases cited by appellee and in other cases.

2. In its opinion, this court noted that the brief of appellee cited only two cases, United States v. Ross, ___ U.S. ___, 72 L.Ed. 2nd 572 (1982) and Chambers v. Maroney, 399 U.S. 42 (1970), which this court felt had no bearing on the issue in this case. Regarding the Ross case, this court noted that that case dealt with the scope of a search of a vehicle, and apparently overlooked the fact that the scope of the search was the point which defense counsel contested in the trial court. In its argument under Point II of its answer brief, appellee pointed out that defense counsel began arguing that his client's vehicle could not be constitutionally searched without a warrant eight hours after it had already been searched and impounded (R 50). When it became apparent that the trial judge was not buying that argument, defense

counsel then shifted ground, and argued that while the police could search the area of the front seat where appellant had been sitting, they could not search the entire car without a warrant (R 53). The Ross case established that if the search was based upon probable cause, the entire vehicle could be searched on that basis. Thus, since the contested search in this case was based upon probable cause, Ross was properly cited by appellee to refute the argument raised by defense counsel at the trial level.

3. Furthermore, this court's statement that the element of mobility was removed in the instant case because the appellant's vehicle had been impounded, and its quotation with emphasis supplied of the statement in the Chambers case regarding an "immediate" search, indicates that this court felt that Chambers had no bearing on the instant issue because the search in this case was not immediate and because the car was impounded. However, this court could have reached those conclusions only by over-

looking the rest of the Chambers opinion. The search in Chambers occurred at the police station after the occupants had been arrested. 399 U. S. at 44. Appellee submits that the search in Chambers was not immediate, nor was the vehicle in that case any more mobile than the vehicle in the instant case. In fact, the Supreme Court, in the paragraph following the one quoted in this court's opinion, stated:

> On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause (sic) factor still obtained at the station house and so did the mobility of the car, unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immoblization

> until a warrant is obtained. The same consequences may not follow where there is unforseeable[sic]cause to search a house....but as Carroll [v United States, 267 U.S. 132 (1925)], held for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.

Id. at 52 (footnote and citation omitted). Thus, a complete reading of the Chambers opinion demonstrates that the use of the word "immediate" was intended to connote a search done without the interviening[sic]judgment of a magistrate, and not an "on the spot" search. This reading of Chambers was confirmed later by the Supreme Court in Coolidge v. New Hampshire, 403 U. S. 443 (1971). In that case, the Court stated that the Carroll doctrine did not justify the later warrantless search at the station house of the vehicle at issue in Coolidge, and explained that Chambers applies only where the initial stop and search could be justified under Carroll. The Court stated that Chambers taught

that "where the police may stop and search an automobile under Carroll, they may also seize it and search it later at the police station." 403 U. S. at 463. The Court elaborated on this point in a footnote as follows:

> It is true that the actual search of the automobile in Chambers was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, any "exigent circumstances" had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of whether the initial intrusion is justified.

Id. at n.20 (emphasis in original). This understanding of Chambers was similarly confirmed in United States v. Ross, supra, where, in a footnote, the Court stated:

The Court also has held that if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded. Chambers, supra; Texas v. White, 423 U. S. 67, 46 L.Ed. 2nd 209, 96 S. Ct. 304. These decisions are based on the practicalities of the situations presented and a realistic appraisal of the relatively minor protection that a contrary rule would provide forprivacy interests. Given the scope of the initial intrusion caused by a seizure of an automobile -- which often could leave the occupants stranded on the highway--the Court rejected an inflexible rule that would force police officers in every case either to post guard at the vehicle while the warrant is obtained or to tow the vehicle itself to the station. Similarly, if an immediate search on the scene could be conducted, but not one at the station if the vehicle is impounded, police often simply would search the vehicle on the street--at no advantage to the occupants, yet possibly at

certain cost[to] the police

72. L.Ed.2nd at 582-583 n.9 (emphasis supplied). Appellee maintains that these cases support its contention, which this court rejected, that the second search of appellant's vehicle was no greater intrusion on his Fourth Amendment rights than the first search. A seizure and a search had already been effected, and as this court noted, they are not challenged in this appeal. If the Fourth Amendment is meant to vindicate the right of privacy, what further right of privacy remains to appellant after the first search, unless one accepts defense counsel's argument that the police could only search the area of the front seat, a contention which Ross clearly refutes. Appellee submits that the above-quoted language from Coolidge teaches that the focus must be on the initial intrusion, and if the initial intrusion is justified, a second, warrantless intrusion based on probable cause is justified as well. In Coolidge the initial intrusion was not justified;

in the instant case its validity has not even been questioned. As Chambers teaches, the same rationale would not apply to a house because of the greater privacy interests at stake.

5. Moreover, appellee respectfully submits that the central inquiry in this case must be the following: Does a second search of a vehicle for evidence based on probable cause seem unreasonable where the police just hours before had already searched, obtained evidence from, and impounded the same vehicle? It must be remembered that

> the Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only "unreasonable searches and seizures." The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.

Coolidge, supra, at 509-510 (Black, J. concurring and dissenting). In a difficult case decided almost three years ago, this court issued a similar re-

minder:

> The many complex and technical judicial applications of the Fourth Amendment of the United States Constitution and Article I Section 12, of the Constitution of Florida must not obscure that only "unreasonable searches and seizures" are proscribed.

State v. Clark, 384 So.2d 687, 690 (Fla. 4th DCA 1980).

6. Furthermore, this court reached a conclusion contrary to the one expressed in the instant opinion in the case of State v. Sanders, 266 So.2d 79 (Fla. 4th DCA), cert.denied 269 So.2d 370 (Fla. 1972). In Sanders, two women had been raped on succeeding days, and gave similar descriptions of the car driven by their assailant to a deputy sheriff. The sheriff was later informed by the Orlando Police that a car fitting the description was located at 10:15 p.m. on November 28, 1972, the same day on which the second victim had been raped. The deputy contacted her station which in turn had a wrecker service tow the

car away and impound it. Later, at 12:03 a.m. on November 29, the deputy and another officer searched the vehicle for the weapon which had been described by both victims. The trial court suppressed the evidence, but this court reversed, relying upon Chambers v. Maroney, supra. Cf. Adoue v. State, 408 So.2d 567, 571-572 (Fla. 1981) (search of an airplane which was parked and had been secured by the police upheld under Chambers); Dennis v. State, 373 So.2d 47, 48 (Fla. 1st DCA 1979) (no warrant required where the defendant had been arrested for possession of contraband and transported along with his truck to the jail and the police searched the truck at the jail later that morning). As in the instant case, the contested search in Sanders was not incident to arrest and took place at an impoundment facility rather than at the police station or the jail, but the Chambers case was found to apply. The only difference between the instant case and Sanders is that the time span in Sanders was just under two hours, while

the time period in the instant case was approximately eight hours. However, that alone does not change the result as is indicated by the United States Supreme Court's decision in Cooper v. California, 386 U. S. 58 (1967). In Cooper, the police seized a small piece of a brown paper sack without a warrant from the glove compartment of the defendant's car which had been impounded in a garage one week earlier at the time of the defendant's arrest. Id. at 58. The Court stated that it would be unreasonable to hold that the police had no right to search a car which they had in their custody "for such a length of time," and rejected the argument that a warrant was required for the search as follows:

> It is no answer to say that the police could have obtained a search warrant, for "[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

Id. at 62 (citation omitted). In Cooper, the defendant was arrested for a nar-

cotics violation, and California law required that the vehicle be held as evidence for forfeiture. Of course, that situation did not obtain in the instant case. Nevertheless, the impoundments in both cases were valid, and in both cases the "subsequent search of the car... was closely related to the reason [the defendant] was arrested...." Id. at 61.

7. Finally, regarding the time element, if the search two hours after impoundment in Sanders was valid, but the search eight hours after impoundment here was not, at what point during the interviening hours was the constitutional threshold crossed? Appellee respectfully submits that there was no such threshold, especially in a case like this where the police not only had impounded the car but had already validly searched it, thereby intruding on whatever privacy rights existed. Appellee further respectfully submits that the instant case will create an impossible quagmire of linedrawing which has not heretofore existed, and which is another reason why

this case should be reheard.

8. If, as appellee urges, this court upon rehearing decides that suppression of the cloth was properly denied, then appellee maintains that the cross examination issue addressed at the conclusion of the opinion is not alone sufficient to justify a reversal of the case. Appellee again contends, as it did in its answer brief, that this point was not properly preserved for appeal because no proffer of the excluded testimony was made. Further, the defense was attempting to establish that the victim received her injuries at the hands of her boyfriend before her encounter with appellant, and that her intercourse with appellant was initially consentual. For the jury to accept that, they would have to have believed that the victim voluntarily met and engaged in sexual intercourse with defendant in the ladies room (R 84-85) despite bruises from a prior beating which was so bad that her eyes were still completely bloodshot two weeks

after the incident (R 25, 40, 180-181). If the suppression motion was properly denied, then appellee contends that it cannot be credibly asserted that the outcome of the trial turned on the restriction on the cross examination of the victim.

9. Appellant will no doubt argue, as appellee always does, that this motion amounts to nothing more than a reargument of the merit of this court's order. However, appellee respectfully submits that the authority presented here establishes (if nothing else) that this court was incorrect in stating that the Ross and Chambers cases have no bearing on the instant issue, and that this court overlooked or misapprehended their relevant ramifications, which is the criterion for rehearing presented in Fla.R.App.P. 9.330 (a). Appellee has also presented cases here which relied on Chambers, but were not cited in its answer brief. It is often contended in rehearing motions which present cases not cited in the briefs that those cases

were overlooked by the court. While in a very technical sense that might be true, it is not fair to contend that the court overlooked something which was not brought to its attention in the first place. On the other hand, appellate attorneys sometimes misjudge what issues the court will find troubling, and due to time constraints do not devote as much attention to those issues as it later turns out the court would have appreciated. Just as this court does not have time to write an opinion in every case, so also undersigned counsel unfortunately does not have time to launch a "full court press" (pun intended) on every issue in every brief--hence, the length of this motion. Appellee strongly believes that the present opinion in this case touches upon a matter of great public importance because police authorities commonly encounter the situation presented here. Thus, if this court denies rehearing or, after reconsideration upon rehearing, decides that its initial conclusion on

the suppression was correct, then appellee would alternatively respectfully request that this court certify the following question as one of great public importance for review by the Florida Supreme Court:

> WHEN POLICE OFFICERS HAVE VALIDLY SEARCHED AND IMPOUNDED A VEHICLE, IS A WARRANT REQUIRED FOR ANY SUBSEQUENT SEARCH OF THE SAME VEHICLE BASED ON PROBABLE CAUSE?

THEREFORE, appellee respectfully requests that this court grant its motion for rehearing and/or certification of question in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 5th day of May, 1983 by Mail/Courier to CRAIG S. BARNARD, ESQUIRE, Chief Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401.

OF COUNSEL